FILE COPY

Office Supreme Court, U.S.
FILED
AUG 14 1959
JAMES R. BROWNING, Clerk

In The
SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1959

No. 312

OBEDIAH GENTRY,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RAYMOND KYLE HAYES
Counsel for Petitioner
North Wilkesboro, N. C.

INDEX

	Page
Opinion Below	2
Jurisdiction	2
Statement	2
Questions Presented	4
Statutes Involved	5
Reasons for Granting Writ	5
Appendix A	11
Appendix B	13
Appendix C	14
Appendix D	15

Citations

Cases:	
Giordenello v. United States, 78 S. Ct. 1245, 357 U. S. 480	5, 7
Jones v. United States, 78 S. Ct. 1253, 357 U.S. 493	7
United States v. Jeffers, 72 S. Ct. 93, 342 U.S. 48	7
United States v. Rabinowitz, 70 S. Ct. 430, 339 U.S. 56	7

In The
SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1959

No.

OBEDIAH GENTRY,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, Obediah Gentry, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINION BELOW

The per curiam opinion of the Court of Appeals (Petitioner's Appendix "A") is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 15, 1959. An order was entered by this Court on the 8th day of July, 1959, extending the time for filing Petition for Writ of Certiorari to and including August 14, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254.

STATEMENT

The petitioner, Obediah Gentry, a negro, well known to the members of the Alcohol and Tobacco Tax Unit and the Marshal, operated a store on the north side of Highway 421 in Wilkes County, within one and one-half mile of the Federal Court House and Marshal's Office and offices of the Alcohol Tax Unit; where he was available during business hours. He lived with his wife and children in the first house just north of the Lincoln Heights High School. On September 30, 1958, Joe E. Carter, Investigator for the Alcohol and Tobacco Tax Unit, made a complaint before Ralph Davis, United States Commissioner, which complaint is set out as Appendix "B", alleging that on July 1st Thomas Walter Moore and Obediah Gentry did possess, remove, conceal and sell a quantity of nontaxpaid distilled spirits namely 60 gallons of whiskey. The commissioner thereupon issued a warrant, which is set out as Appendix "C", the same being for possessing, removing, concealing and selling a quantity of nontaxpaid distilled spirits namely

60 gallons of whiskey, in violation of U.S.C. Title 26, Sections 5008 and 7206 (4).

Shortly after daylight on the morning of October 2, 1958, at about 6:30 a.m., four officers of the Alcohol and Tobacco Tax Unit went to the home of Obediah Gentry to serve the purported arrest warrant not for the purpose of taking him into custody and apprehending him for a violation alleged to have been committed on the 1st day of July, 1958, but to obtain access to his private dwelling and curtilage for the purpose of searching for contraband whiskey, according to the contention of the petitioner. It being common knowledge among the searching officers, as alleged by the petitioner, that the petitioner would be at his place of business if the officers waited until after 7 o'clock and served him at his place of business and, therefore, no opportunity to search his home. On evidence obtained by the officers on the morning of October 2, 1958, an indictment charging the violation of Title 26 USC 5632, 5008 was returned. The first count charged the removal of distilled spirits. The second count charged the concealment of distilled spirits and the third count charged possession of distilled spirits on which the tax had not been paid and the required stamps affixed thereto. The petitioner challenged the search by a motion to suppress in the District Court but the court held that the search was legal and sentenced the defendant to 15 months in prison and a fine of $500.00, from which sentence the petitioner appealed to the United States Court of Appeals, where the per curiam opinion of approximately ten lines decided the petitioner's constitutional rights to be secure from unreasonable search and seizure in the proverbial castle referred to by the writers of the fundamental laws of liberty and freedom. The petitioner was never brought to trial for the

charges set out in the warrant of arrest which the officers took to his home to serve on the morning the search was made and the evidence found on which he was tried.

QUESTIONS PRESENTED

1. Was the complaint of Investigator Carter sufficient to constitute probable cause for the issuance of the warrant against the petitioner, his information being hear-say evidence as shown by Transcript pages 50 through 74, and at the most D. D. Snuggs is not a complaining witness?

2. Was the complaint defective in that it recited no more than the elements of the crime charged?

3. Is the warrant of arrest invalid because it recites the wording of a defective complaint?

4. Was the arrest of the petitioner Gentry invalid?

5. Did the officers use the purported warrant as a pretext to arrest and gain access to the petitioner's private dwelling for the purpose of searching his home and curtilage?

6. May enforcement officers of the Alcohol and Tobacco Tax Unit elect to serve a purported warrant of arrest themselves at an individual's private residence and thus gain entrance into his home and search therein when it is common knowledge that he is available at his place of business during business hours?

7. May enforcement officers of the Alcohol and Tobacco Tax Unit search a private garage when they observed the odor of distilled spirits after having arrested the owner in

his living room for an alleged offense committed 90 days prior thereto, or should the officers submit that information to a United States Commissioner to determine whether there was probable cause and issue a search warrant for said garage?

STATUTES INVOLVED

The statutory provisions involved are U.S.C. Title 26, Sections 5008 and 7206 (4).

REASONS FOR GRANTING WRIT

The petitioner contends that the holding of the Fourth Circuit of the Court of Appeals is in direct conflict with the holdings of this Court in the case of *Giordenello* v. *United States*, 78 S. Ct. 1245, 357 U.S. 480, decided June 30, 1958.

The complaint as set out in the *Giordenello* case reads as follows:

> "The undersigned complainant (Finley) being duly sworn, states: That on or about January 26, 1956, at Houston, Texas in the Southern District of Texas, Veto Giordenello did receive, conceal, etc., narcotic drugs, to-wit: heroin hydrochloride with knowledge of unlawful importation; in violation of Section 174, Title 21, United States Code.
>
> "And the complainant further states that he believes that ..... are material witnesses in relation to this charge."

The complaint in the instant case which the officers purportedly went to the petitioner's home to serve at the time they made the search, reads as follows:

> "The undersigned complainant being duly sworn states: That on or about July 1, 1958, at Wilkes County, Middle District of N.C. Thomas Walter Moore and Obediah Gentry did possess, remove, conceal, and sell a quantity of non taxpaid distilled spirits namely 60 gallons of whiskey.
>
> "And the complainant further states that he believes that D. D. Snuggs, Joe Carter are material witnesses in relation to this charge."

The complaint was signed by Joe E. Carter.

The petitioner contends he was placed under arrest under what he alleges is an invalid warrant and based on an invalid complaint: that Carter's information was no more than hear-say, that it was for an offense alleged to have been committed on July 1, 1958, and the complaint was made on September 30, 1958, which was approximately 90 days thereafter. The petitioner was never tried on the charge of July 1, 1958 as set out in the complaint and warrant of September 30, 1958, which the petitioner contends is further evidence that the complaint of September 30th and the warrant of the same date were based on hear-say evidence and that neither Carter nor Snuggs knew enough on the petitioner to submit to the Commissioner

evidence which would constitute probable cause for the issuance of the warrant or his arrest, and that the purported arrest of this petitioner on the morning of October 2, 1958, was invalid notwithstanding the Circuit Court's statement in its opinion that the validity of the arrest was not questioned, and the holdings in this case conflict with the holdings of this Court in the *Giordenello case* cited above and also is in conflict with the holdings in the case of *Jones* v. *United States*, 78 S. Ct. 1253, 357 U. S. 493. That while the Circuit Court says in its opinion that the validity of the arrest was not challenged, the petitioner was challenging the proceedings from the beginning, and that since the discovery of the *Giordenello case* more earnestly challenges the validity of the arrest, and although the actual arrest may not have been challenged prior to this time certainly the search has been challenged all the way and if the arrest warrant be fatally defective the validity of the search, which produced the evidence for which he was tried, could certainly not be justified by an invalid arrest whenever and wherever arrest was challenged.

The petitioner contends that the case at bar also conflicts with the holdings of this Court in the case of *United States* v. *Rabinowitz*, 70 S. Ct. 430, 339 U. S. 56, and with other cases cited in the *Rabinowitz case*, and that it is also in conflict with the case of *United States* vs. *Jeffers*, 72 S. Ct. 93, 342 U. S. 48.

It will be noted that the return on the purported warrant of arrest (Appendix "C") is made by the Marshal who was never closer to the home of the petitioner than his office and who had no part in the arrest whatever, and the return was not signed by any

of the purported arresting officers who constituted the searching party.

The petitioner contends that the lower court completely brushed aside his contention, which he says is supported by the preponderance of the evidence, that the purported arrest warrant was used as a pretext to gain entrance into the petitioner's home for the sole purpose of searching his residence and his garage, because they knew they could not obtain a search warrant for his premises; and the petitioner cites the fact that the officers went to his residence at 6:30 a.m., which was late enough in the morning to be after daylight hours and early enough to be sure he had not left his home to go to his place of business.

The fact that it was known to the officers that the petitioner was accustomed to being at his place of business along the highway which they traveled to get to his home; the fact that the United States Marshal had his office in the same building with the enforcement officers and that they had kept the purported warrant themselves after having obtained it from the commissioner and made no effort to serve it from the 30th day of September, 1958 until the morning of October 2, 1958; the fact that the defendant was summoned from his bed to his door and placed under arrest in the living room of his house and that his house was searched and his basement searched and no contraband found therein; the fact that the officers demanded the key to the garage from the petitioner and the same was refused and then with force the officers broke the door open to the garage, all of which the petitioner contends was a part of a plan on behalf of the enforcement officers to enter the privacies of the petitioner without submitting their suspicious or any evidence which they had to a United

States Commissioner for the purpose of him determining probable cause and issuing a search warrant thereon, was an invasion of the petitioner's rights as guaranteed to him under the Constitution of the United States.

To permit this search to stand places in the bosom of officers the right to invade the privacies of any person's home, provided under some pretext they can get a warrant for the arrest of the person and subject him to searches and seizures which would completely nullify the guaranty of the Fourth and Fifth Amendments of the Constitution of the United States, and for the reasons herein set forth it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,
RAYMOND KYLE HAYES
Counsel for Petitioner
North Wilkesboro, N. C.

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7852.

Obediah Gentry,
Appellant,

versus

United States of America,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA, AT WILKESBORO. EDWIN M. STANLEY, DISTRICT JUDGE.

(Argued June 10, 1959. Decided June 15, 1959)

Before SOBELOFF, Chief Judge, HAYNSWORTH, Circuit Judge, and BARKSDALE, District Judge.

Kyle Hayes for Appellant, and Lafayette Williams, Assistant United States Attorney, (James E. Holshouser, United States Attorney, on brief) for Appellee.

PER CURIAM.

After arresting the appellant on a warrant charging unlawful possession, removal, and sale of whiskey, the arresting officers proceeded to search the appellant's home. The legality of the arrest is not disputed. Having detected the odor of whiskey apparently coming from the basement of the house or from the garage on the premises, the officers extended the search to the garage, where they found illicit liquor. In a prosecution for the possession of this liquor, a motion to suppress was offered and denied. We find no error.

Affirmed.

APPENDIX "B"

UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF NORTH CAROLINA

Commissioner's Docket No. 7

Case No. 378

United States of America

v.

Thomas Walter Moore
Obediah Gentry

COMPLAINT for VIOLATION of
U.S.C. Title 26
Section 5008, 7206(4)

BEFORE Ralph Davis, North Wilkesboro, N.C.,
The undersigned complainant being duly sworn states:
That on or about July 1, 1958, at Wilkes County in the Middle District of N.C. Thomas Walter Moore and Obediah Gentry did possess, remove, conceal and sell a quantity of non taxpaid distilled spirits namely 60 gallons of whiskey.

And the complainant further states that he believes that D. D. Snuggs, Joe Carter are material witnesses in relation to this charge.

JOE E. CARTER
Inv. ATTD

Sworn to before me, and subscribed in my presence, September 30, 1958.

RALPH DAVIS
United States Commissioner

APPENDIX "C"

UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF NORTH CAROLINA
Commissioner's Docket No. 7
Case No. 382

United States of America

v.

Thomas Walter Moore
Obediah Gentry

WARRANT OF ARREST.

To Any U. S. Marshal or other authorized Officer:

You are hereby commanded to arrest Thomas Walter Moore and Obediah Gentry and bring him forthwith before the nearest available United States Commissioner to answer to a complaint charging him with possessing, removing and concealing and selling a quantity of non taxpaid distilled spirits, namely 60 gallons of whiskey in violation of U.S.C. Title, 26, Section 5008 and 7206(4).

Date September 30, 1958.

Ralph Davis *United States Commissioner*

RETURN

Received Oct. 2nd, 1958 at Wilkesboro, N.C., and executed by arrest of Defendants at Wilkesboro, N. C. on Oct. 2nd, 1958, and taking them before Com. Ralph Davis where they posted Bonds for Hearing on Oct. 24th 1958.

Wm. B. Somers U. S. Marshal

Date Oct. 2nd, 1958. Middle District of N. C.

By ....., Deputy

APPENDIX "D"

IN THE UNITED STATES DISTRICT COURT
For the Middle District of North Carolina

WILKESBORO Division

Feb. 2nd, 1959

No. 411W58

26 USC 5632, 5008

UNITED STATES OF AMERICA

v.

Obediah Gentry

The Grand Jury Charges:

On or about the 2nd day of October, 1958, in the Middle District of North Carolina, Obediah Gentry removed and aided and abetted in the removal of distilled spirits, on which the tax imposed by law had not been paid, to a place other than an internal revenue bonded warehouse provided by law.

SECOND COUNT

The Grand Jury Charges:

On or about the 2nd day of October, 1958, in the Middle District of North Carolina, Obediah Gentry concealed and aided and abetted in the concealment of distilled spirits on which the tax had not been paid and which had been removed in a manner contrary to law.

THIRD COUNT

The Grand Jury Charges:

On or about the 2nd day of October, 1958, in the Middle District of North Carolina, Obediah Gentry possessed distilled spirits in containers which did not have the required stamps affixed thereto.

A True Bill

.....

Foreman.

.....

United States Attorney